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 18 REED, and COASTAL PROTECTION
 RANGERS, INC.
 19

20 **UNITED STATES DISTRICT COURT**
 21 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
 22

23 CORY SPENCER, an individual;
 24 DIANA MILENA REED, an
 individual; and COASTAL
 25 PROTECTION RANGERS, INC., a
 26 California non-profit public benefit
 corporation,
 27

28 Plaintiffs,

CASE NO. 2:16-cv-02129-SJO (RAOx)

**PLAINTIFFS' OPPOSITION TO
 DEFENDANT BLAKEMAN'S
 MOTION TO STRIKE**

Judge: Hon. S. James Otero
 Date: September 5, 2017
 Time: 10:00 a.m.
 Crtrm.: 10C

1
2 v.

3 LUNADA BAY BOYS; THE
4 INDIVIDUAL MEMBERS OF THE
5 LUNADA BAY BOYS, including but
6 not limited to SANG LEE, BRANT
7 BLAKEMAN, ALAN JOHNSTON,
8 AKA JALIAN JOHNSTON,
9 MICHAEL RAE PAPAYANS,
10 ANGELO FERRARA, FRANK
11 FERRARA, CHARLIE FERRARA,
and N. F.; CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE JEFF
KEPLEY, in his representative
capacity; and DOES 1-10,

12 Defendants.
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Complaint Filed:
Trial Date:

March 29, 2016
November 7, 2017

I. INTRODUCTION

Defendant Blakeman's motion to strike Plaintiffs' evidence in support of their oppositions to Defendants' summary judgment motions is both substantively flawed and procedurally improper, and should be denied.

As an initial matter, a "motion to strike" is not the proper means of challenging evidence submitted in support of an opposition to a summary judgment motion.¹ Even if it were, however, Defendant Blakeman failed to meet and confer with Plaintiffs before filing this motion, as required by Local Rule 7-3. He compounded that failure by failing to give Plaintiffs proper notice of his motion. Blakeman's deficient motion to strike should be denied for these reasons alone.

Furthermore, even if Blakeman's motion to strike were procedurally proper, it is without merit in any event. The recording (and related transcript) Blakeman seeks to exclude was obtained lawfully, and consists of non-hearsay statements made by a party in his individual capacity that he believed to be true. And, contrary to Blakeman's baseless and conclusory assertions, presented without any substantive explanation or argument, all of the evidence Blakeman seeks to strike is, in fact, both relevant and admissible.

Because there is no basis upon which to strike the evidence Blakeman challenges through his improper motion to strike, Plaintiffs respectfully request that Blakeman's motion be denied.

¹ Blakeman's use of a "motion to strike" to challenge the contents of a declaration in opposition of a summary judgment motion is based on an outdated and incorrect understanding of the Federal Rules of Civil Procedure. "Prior to December 1, 2010, the proper method by which to attack an affidavit was by filing a motion to strike ... Under the now-applicable Rule 56(c)(2), however, it is no longer necessary for a party to file such a motion; instead, the party may simply object to the material." *Cutting Underwater Techs. USA, Inc. v. Eni U.S. Operating Co.*, 671 F.3d 512, 515 (5th Cir. 2012). While Blakeman's motion to strike should be denied on this procedural basis alone, Plaintiffs will nonetheless address herein the "merits" – such as they are – of Blakeman's motion.

II. ARGUMENT

A. The Evidence Blakeman Seeks to Strike is Admissible and Relevant.

Blakeman moves to strike two categories of evidence from Plaintiffs' opposition: (1) Evidence of Plaintiff Diana Reed's video-recorded conversation with Defendant Charlie Ferrara, including a transcript of this conversation and the recording itself (Exhibits 43 and 38; Docket Nos. 362 and 385, respectively); and (2) Declarations of percipient witnesses previously filed in support of Plaintiffs' motion for class certification (Exhibits 12, 16-27, 29, 31-33, 35, 37; Docket Nos. 347, 354, 356, 361, 364, 366, 368, 370, 372, 373, 375, 381, 383, 382, 379, 378, 377, 374, and 371, respectively).² All of these exhibits are relevant and admissible, and no basis exists for their being stricken from the record.

1. There Is No Basis To Strike The Video Recording Of Defendant Charlie Ferrara's Conversation With Plaintiff Reed And The Transcript Of The Conversation.

Blakeman asserts, without any analysis or explanation, that Plaintiff Reed's recorded conversation with Defendant Charlie Ferrara, and the transcript of that conversation (wherein he describes the Bay Boys' hierarchy, purpose, and tactics), should be stricken. Blakeman argues that this illuminating recording lacks foundation, is unauthenticated, and is hearsay, and further contends that the conversation was "illegally recorded." (Blakeman Mot. to Strike [Dkt. No. 411-2] at 2:2-5.) Given the content and substance of the recording, which contains critical admissions and is extraordinarily damaging not only to Blakeman's summary judgment motion but to his defenses in this matter generally, it is easy to understand why Blakeman would want to get rid of this highly probative evidence. However, Blakeman's arguments for exclusion of the recording and transcript have no merit.

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² Blakeman's motion to strike provides the incorrect ECF number for Exhibits 31, 35, and 37. The correct ECF numbers for those three exhibits are 379, 374, and 371, respectively.

1 First, Blakeman states, in conclusory fashion, that the audio recording and
2 transcript “lack foundation” (Blakeman Mot. to Strike [Dkt. No. 411-2] at 2:3), but
3 foundation was provided in the Declarations of Samantha Wolff (Docket No. 346, ¶
4 39) and Diana Milena Reed (Docket No. 380, ¶¶ 36-38). These same declarations
5 also authenticate the video recording and transcript. *See id.*

6 Next, Blakeman asserts that his co-defendant’s statements are hearsay. They
7 are not. The statements offered as evidence were made by an opposing party
8 (Defendant Charlie Ferrara) in his individual capacity, and were statements that he
9 believed to be true. Therefore, they are not hearsay. Fed. R. Evid. 801(d)(2). The
10 statements may be offered not only against Defendant Ferrara himself, but also
11 against his co-conspirators, including Blakeman and all other defendants. Fed. R.
12 Evid. 801(d)(2)(e). And, even if Defendant Ferrara’s candid statements regarding
13 the Bay Boys’ criminal scheme to misappropriate valuable public property were
14 hearsay (which they are not), they would be admissible as admissions against
15 Defendant Ferrara’s interest in any event. Fed. R. Evid. 804(b)(3).

16 Blakeman then complains that the recording was obtained illegally.
17 Blakeman fails to explain the basis of this complaint, but quotes a portion of the
18 conversation between Defendant Ferrara and Plaintiff Reed, taken out of context to
19 suggest that Defendant Ferrara was unaware that he was being recorded. (Blakeman
20 Mot. to Strike [Dkt. No. 411-2] at 2:6-7.) Blakeman’s contention is unsupported by
21 either fact or law.

22 Defendant Ferrara was, in fact, aware that he was being recorded, and
23 Blakeman’s misleading quote is belied by the evidence. As Plaintiff Reed explained
24 in her declaration, Chief Kepley and Captain Best had instructed Plaintiff Reed to
25 bring her cell phone with her to the beach as a form of protection. (Reed Decl. [Dkt.
26 No. 380] at 12:17-18.) Defendant Charlie Ferrara “pointed to my Canon camera and
27 asked if I was recording him using that camera. I was not, and I told him as much.”
28 (*Id.* at 14:21-22.) But, as Plaintiff Reed explained in her declaration, her cell phone

1 “was sitting face-up and in plain view on a table in the Rock Fort.” (*Id.* at ¶ 38.) At
 2 all relevant times, Plaintiff Reed believed that Defendant Charlie Ferrara knew she
 3 was recording him and that he was simultaneously recording her, since she saw him
 4 holding an audio recording device. (*Id.*)

5 Further, even if Defendant Ferrara had been unaware that he was being
 6 recorded (which he was), this conversation between Defendant Charlie Ferrara and
 7 Plaintiff Diana Reed took place in an open area along a public beach. (Reed Decl.
 8 [Dkt. No. 380] at ¶ 38.) Defendant Ferrara had no reasonable expectation of privacy
 9 at this location under these circumstances. *Wilkins v. National Broadcasting Co.,*
 10 *Inc.*, 71 Cal. App. 4th 1066, 1078 (1999) (holding that a conversation that occurred
 11 on an outdoor patio at a public restaurant could not reasonably be expected to be
 12 confidential). And, even if Defendant Charlie Ferrara did not consent to the
 13 recording or was unaware of it, the recording was nonetheless legally obtained and
 14 is admissible under federal law. Only one party must consent to the recording. 18
 15 U.S.C. § 2511(2)(d) (the recording of oral communications is not unlawful “where a
 16 party to the conversation is either the one who has intercepted the conversation or
 17 who has consented to the interception, and the interception is not for the purpose of
 18 committing any criminal or tortious act.”). Thus, even if the recording had violated
 19 state law (which it did not), it is nonetheless admissible in this federal proceeding.
 20 *See Roberts v. Americable International, Inc.*, 883 F.Supp. 499, 503 (E.D. Cal.
 21 1995) (tapes obtained in violation of California law “admissible in federal court
 22 proceedings when obtained in conformance with federal law and without regard to
 23 state law”); accord *United States v. Adams*, 694 F.2d 200, 201-02 (9th Cir. 1982).

24 Finally, the recording is admissible for impeachment purposes in any event.
 25 *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1497 (1988) (“The truth-finding
 26 function of trial, already strained by the exclusion of the writings themselves, should
 27 not be burdened further by the presentation of evidence through witnesses who may
 28 lie with impunity.”).

1 For all of these reasons, there is no basis to strike either the video recording or
2 the transcript of Defendant Ferrara and Plaintiff Reed's conversation.

3 **2. The Declarations In Support Of Class Certification Are Relevant**
4 **To Plaintiffs' Opposition To Defendants' Summary Judgment**
5 **Motions.**

6 Blakeman argues that 18 declarations submitted by Plaintiffs in support of
7 their opposition to Defendants' motions for summary judgment should be stricken
8 because they "do not have 'any conceivable relevance'" to Defendants' motions.
9 (Blakeman Mot. to Strike [Dkt. No. 411-2] at 2:12.) Blakeman offers no further
10 analysis or explanation. But, these declarations – which document the Bay Boys'
11 extensive conspiracy to exclude outsiders – are undeniably relevant for content,
12 context, corroboration, and history, and support Plaintiffs' conspiracy allegations.
13 These witnesses explain their encounters with the Bay Boys and the City's
14 complicity, all of which is strikingly similar to the experiences of the named
15 Plaintiffs. (*See, e.g.*, Wolff Decl., Exh. 16 [Dkt. No. 354] [Conn Decl.] (describing
16 harassment and physical assault with a rock by the Bay Boys, which Palos Verdes
17 Estates police failed to investigate or address); Exh. 17 [Dkt. No. 356] [Gero Decl.]
18 (describing physical intimidation, assault, and automobile vandalism by the Bay
19 Boys); Exh. 18 [Dkt. No. 361] [Gersch Decl.] (describing harassment and
20 intimidation by Bay Boys, including Blakeman, as well as assault with projectiles
21 and complicit conduct by police); Exh. 19 [Dkt. No. 364] [Hagins Decl.] (describing
22 assault and death threats by Bay Boys and police refusal to help); Exh. 22 [Dkt. No.
23 370] [Krell Decl.] (describing harassment and property vandalism and theft by Bay
24 Boys and disappointing, ineffective police intervention)).

25 The declarations corroborate Plaintiffs' allegations of assault, battery,
26 intimidation, and exclusion perpetrated by the Bay Boys, and complicit, negligent
27 behavior on the part of the City, and are all highly relevant because, among other
28 reasons, they tend to make Plaintiffs' allegations more probable. Fed. R. Evid.
401(a). These declarations cannot be stricken on general "relevance" grounds.

B. Blakeman's Motion To Strike Is Procedurally Defective.

Not only is Blakeman's motion meritless, but he also failed to comply with multiple procedural prerequisites prior to filing it. Blakeman's evidentiary objections are improperly styled as a "motion to strike" (see *Cutting Underwater Techs. USA, Inc. v. Eni U.S. Operating Co.*, 671 F.3d 512, 515 (5th Cir. 2012) (motion to strike not proper means of challenging evidence submitted in connection with summary judgment motion or opposition); but, since Blakeman erroneously chose to file his evidentiary objections in the form of a motion, he was obligated to comply with this Court's local rules pertaining to motions. He did not do so, and his motion to strike is therefore fatally defective.

Central District Local Rule 7-3 provides that "counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution," and that this discussion must occur at least one week before filing the motion. Defendant Blakeman is represented by a number of attorneys, yet no one contacted counsel for Plaintiffs to discuss the substance of this motion, in violation of the local rules. Wolff Declaration in Support of Opposition to Motion to Strike (Wolff Decl.), ¶ 2.

Defendant Blakeman was also required to file this motion at least 28 days before the date set for hearing. C.D. L.R. 6-1; *see also* Standing Order, Docket No. 9 at ¶ 16 ("Parties must strictly comply with L.R. 601, 7-9, and 7-10."). Here, however, Defendant Blakeman apparently anticipates his motion will be heard on September 5, 2017, yet filed his motion with only 19 days' notice. *See* Docket No. 411-2 (filed on Aug. 17, 2017, noticing hearing date of September 5, 2017). This is not sufficient notice. C.D. L.R. 6-1.

These procedural deficiencies provide an equally strong basis for denying Blakeman's motion as the substantive deficiencies outlined above. Blakeman's motion can and should be denied in its entirety for any one of these several reasons.

III. CONCLUSION

DATED: August 24, 2017

By: */s/ Landon D. Bailey*